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Supreme Court U.S.
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No. 01-1317

IN THE

Supreme Court of the United States

THE ATTORNEY GENERAL OF CANADA,

Petitioner,

v.

R.J. REYNOLDS TOBACCO HOLDINGS, INC.; R.J. REYNOLDS TOBACCO COMPANY; R.J. REYNOLDS TOBACCO INTERNATIONAL, INC.; RJR-MACDONALD, INC.; R.J. REYNOLDS TOBACCO COMPANY, PR; NORTHERN BRANDS INTERNATIONAL, INC.; AND CANADIAN TOBACCO MANUFACTURERS COUNCIL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

In permitting treble-damages actions by "person[s]" for injuries to their "business or property" caused by racketeering (18 U.S.C. § 1964(c)), does RICO abrogate the common-law revenue rule, which has long barred one country from directly or indirectly enforcing its tax laws in the courts of another country?

RULE 29.6 STATEMENT

1. R.J. Reynolds Tobacco Holdings, Inc.:

(A) does not have a parent company and the following publicly-held companies own 10% or more of the corporation's stock: Fidelity Management, and Capital Research and Management Company; and

(B) is the parent corporation for R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International, Inc., R.J. Reynolds Tobacco Company, PR, and Northern Brands International, Inc. No publicly-held company owns 10% or more of the stock of any of these subsidiaries.

2. RJR-MacDonald, Inc. (currently JTI-MacDonald Corp.) has a parent corporation, Japan Tobacco Inc., and no publicly-held company owns 10% or more of Japan Tobacco Inc.'s stock.

3. The Canadian Tobacco Manufacturers Council ("CTMC") is a non-profit corporation with its principal office in Ottawa, Canada that does not sell stock to the public. The members of the CTMC are Imperial Tobacco Ltd., Rothmans, Benson & Hedges, Inc., and JTI-MacDonald Corp.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

STATEMENT 1

I. FACTS 2

II. THE DECISIONS BELOW 3

REASONS FOR DENYING THE WRIT 5

I. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY OTHER LOWER-COURT DECISIONS 6

II. AS CANADA'S OWN ACTIONS ATTEST, THE QUESTION PRESENTED DOES NOT HAVE THE IMPORTANCE THAT THE ATTORNEY GENERAL ASCRIBES TO IT 7

III. THE SECOND CIRCUIT'S DECISION IS CORRECT ON THE MERITS 9

A. In Enacting RICO, Congress Did Not Abrogate The Time-Honored Revenue Rule 9

1. The Revenue Rule Was Well Established Long Before Congress Passed RICO 9

2. RICO Does Not Abrogate This Common-Law Rule 12

B. The Revenue Rule Applies To Efforts To Use U.S. Fraud Law To Collect Foreign Taxes 13

C. The Attorney General Errs In Claiming That The Second Circuit's Decision Will Interfere With Traditional Tax-Collection Efforts 16

IV. THIS CASE PRESENTS A POOR VEHICLE FOR REVIEWING THESE ISSUES 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Page

Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991) 12
Banco Do Brasil, S.A. v. A.C. Israel Commodity Co., 190 N.E.2d 235 (N.Y. 1963) 14
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 10, 11
Beck v. Prupis, 529 U.S. 494 (2000) 1, 5, 12
Bennett v. Spear, 520 U.S. 154 (1997) 18
Braxton v. United States, 500 U.S. 344 (1991) 6
Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) 7
Gov't of India v. Taylor, [1955] A.C. 491 (H.L.) 10, 11
Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson, 597 F.2d 1161 (9th Cir. 1979) 9, 10
Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258 (1992) 1, 5, 12
Huntington v. Attrill, 146 U.S. 657 (1892) 10
Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935) 14
Moore v. Mitchell, 30 F.2d 600 (2d Cir. 1929), *aff'd*, 281 U.S. 18 (1930) 14
Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999) 18
Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999) 7
Peter Buchanan Ltd. v. McVey, [1954] I.R. 89 (Ir. H. Ct. 1950), *aff'd*, [1954] I.R. 89 (Ir. S.C. 1951) 11, 15
QRS 1 APS v. Frandsen, 3 All E.R. 289 (C.A. 1999), 1999 WL 477337 15
Ross v. Moffitt, 417 U.S. 600 (1974) 9

United States v. First Nat'l City Bank, 321 F.2d 14 (2d Cir. 1963), *rev'd on other grounds*, 379 U.S. 378 (1965) 10, 11
United States v. Harden, [1963] S.C.R. 366 (Can.) 10, 14, 15, 16
Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd., [1986] A.C. 368 (H.L.) 11

Statutes

18 U.S.C. § 1961 *et seq* 2
18 U.S.C. § 1964(c) ..... *passim*

Miscellaneous

Hans W. Baade, *The Operation of Foreign Public Law*, 30 Tex. Int'l L.J. 429, 482 (1995) 10
Canadian Criminal Code, Sec. 465(1)(c) 2
Canadian Excise Act, R.S.C., 1985, Sec. 240 (1) 2, 12
Convention Between the United States of America and Canada With Respect to Taxes on Income and Capital, Sept. 26, 1980, U.S.-Can., T.I.A.S. No. 11087 ..... 2, 12, 16
1 Dicey & Morris, *The Conflict of Laws* (13th ed. 2000) 15
Protocol Amending the Convention Between the United States of America and Canada With Respect to Taxes on Income and Capital, Nov. 9, 1995, U.S.-Can., Art. XXVIA(2), 1 Tax Treaties (CCH) ¶ 1901.261 at 21,005-26 ..... 2, 12, 16

STATEMENT

In their decisions below, both lower courts rejected an attempt by the Attorney General of Canada to use RICO to collect three times the tax revenues Canada allegedly lost as a result of a scheme to smuggle cigarettes into the country. The court's opinion joined an unbroken line of decisions over the past 200 years in which courts in this country and abroad have applied the venerable "revenue rule" to bar one country from enforcing its tax laws, directly or indirectly, in the courts of another country. The Attorney General concedes that there is no circuit conflict over the issue. And he cannot dispute that Canada's own judiciary would invoke—and has previously invoked—the revenue rule to bar a suit by the United States to enforce American tax laws in Canadian courts.

Against this backdrop, petitioner asks the Court to rule, thirty-two years after RICO was enacted, that Congress intended to abrogate the revenue rule when it passed this anti-racketeering statute. If true, this theory of abrogation would allow any country, whether friend or foe, to ignore its own tax-collection laws and to avoid the trouble of negotiating a reciprocal tax-collection treaty with our government simply by invoking RICO in American courts to recover treble taxes plus attorney fees. But as the Court has made abundantly clear and as the lower courts correctly recognized, the general words of RICO do not customarily alter common-law principles in existence when the statute was written. *Beck v. Prupis*, 529 U.S. 494 (2000); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992). In the absence of any clear direction by Congress to abrogate the revenue rule (or for that matter any mention of the rule in the legislative debates over RICO), and in the absence of any conflict in the courts of appeals (or for that matter any foreign courts), no cognizable basis exists for this Court to be "drawn into issues and disputes of foreign relations policy that are assigned to—and better handled by—the political branches of government." Pet. App. A18-19.

I. FACTS.

In 1991, Canada doubled its taxes on tobacco products. Pet. App. A3. Soon thereafter, it realized that smugglers were bringing cigarettes into the country through the St. Regis/Akwesasne Indian Reservation on the New York-Canadian border in an effort to avoid these taxes. *Id.* at A3.

At the time Canada discovered this alleged tax-evasion scheme, as today, it had a variety of tax-enforcement provisions available to address this type of problem. These included numerous civil and criminal laws as well as a 1980 American-Canadian Treaty and a 1995 Protocol between the countries designed to facilitate cross-border tax collection of certain final tax judgments. *See* Section 240(1), The Canadian Excise Act, R.S.C., 1985; Canadian Criminal Code, Section 465(1)(c); Convention Between the United States of America and Canada With Respect to Taxes on Income and Capital, Sept. 26, 1980, U.S.-Can., T.I.A.S. No. 11087; Protocol Amending the Convention Between the United States of America and Canada With Respect to Taxes on Income and Capital, Nov. 9, 1995, U.S.-Can., Art. XXVI A(2), 1 Tax Treaties (CCH) ¶ 1901.261, at 21,005-26 (hereinafter "U.S.-Canada Income Tax Treaty (1995 Protocol"); s*ee also* Appendix A (summarizing Canadian and U.S. treaties and laws that address smuggling and related cross-border criminal activities).

Rather than invoke these laws and treaties and rather than use its own courts to recover these tax revenues, Canada tried something different. Its Attorney General filed a civil action for *treble* damages in an American court seeking to recover the allegedly lost Canadian taxes under an American law—the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*.

In doing so, the Attorney General filed the action in federal court in the Northern District of New York, and named a variety of international defendants: RJR-MacDonald, Inc.,

a Canadian company; the Canadian Tobacco Manufacturers Council, a trade association based in Canada; and several other companies—Northern Brands International, Inc., R.J. Reynolds Tobacco International, Inc., R.J. Reynolds Tobacco Holdings, Inc., R.J. Reynolds Tobacco Company, and R.J. Reynolds Tobacco Company, PR. According to the complaint, the parties responsible for the alleged tax evasion were not just the cigarette smugglers themselves but the distributors of the cigarettes and the manufacturers as well. As for damages, each of the Attorney General's claims stemmed from a tax-related injury, ranging from (1) lost revenue due to the evasion of tobacco duties and taxes to (2) law-enforcement costs incurred to stop the alleged smuggling.

In response, all of the defendants moved to dismiss the complaint as a matter of law. They raised a variety of legal defenses, including the claim that the RICO treble-damages provision (18 U.S.C. § 1964(c)) does not abrogate the long-established revenue rule, which bars one country from directly or indirectly collecting its taxes in the courts of another country. The Canadian Tobacco Manufacturers Council also separately moved to dismiss on personal-jurisdiction and forum-non-conveniens grounds, and continues to object to the federal courts' jurisdiction over it.

II. THE DECISIONS BELOW.

The district court granted the motion on revenue-rule grounds. "Enforcing foreign revenue laws," it concluded, "is precisely the type of meddling in foreign affairs the Revenue Rule forbids." Pet. App. B16. Because the Canadian Attorney General's claim would have required the court to adjudicate and enforce foreign tax claims both directly and indirectly, it determined that the revenue rule applied. *Id.* at B13. And because the general language of RICO did not abrogate this common-law principle, the court reasoned that the rule barred this claim: "[T]his Court is precluded from affording the Canadian government an alternative mechanism *not expressly*

authorized by the legislative and/or executive branches of government—those branches particularly responsible for establishing and conducting international relations—by which it may recoup lost tax revenues in the courts of the United States." Pet. App. B17 (emphasis added). Nor, the court added, did international tax-collection treaties bolster the claim. To the contrary: "[W]hile the [United States-Canadian Income Tax Convention] may abrogate the Revenue Rule insofar as the two countries may recognize one another's final judgments (or their equivalents), it does not go so far as to eliminate the Rule with respect to unadjudicated or otherwise non-final revenue claims." *Id.* at B12.

The Second Circuit affirmed. "The revenue rule," the court observed, "is a longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns." *Id.* at A10. It then determined that an "[e]xamination of both the policies underlying the revenue rule, and the rule's congruence with the international tax policies pursued by the political branches of our government, supports the conclusion that the revenue rule is applicable to the particular facts of the case at hand." *Id.*

Discerning nothing in the text, purpose or legislative history of RICO that Congress meant suddenly to abrogate the revenue rule when it enacted the provision in 1970, the appellate court concluded that RICO did not alter the rule. Nor was the court persuaded by the alternative claim that the revenue rule could be evaded simply by invoking the law of the home forum—be it American fraud law, breach-of-contract law, tort law, or (as here) RICO law. "We are not persuaded by Canada's arguments that this is an action brought solely under United States law, and not a claim for Canadian taxes. On the contrary, Canada seeks to use the United States law to enforce, both directly and indirectly, its tax laws." *Id.* at A48-50. Recognizing that this exception would swallow the rule

and that no court at all events had ever recognized such an exception, the court thus rejected this alternative theory. *Id.*

In dissent, Judge Calabresi acknowledged that he "fully share[s] the majority's concerns that applying civil RICO to violations of foreign tax law may be harmful to American trade interests and to American companies doing business abroad." Pet. App. A65. But he nonetheless believed, among other things, that the court's holding conflicted with Second Circuit precedent. *See id.* at A58. When the Attorney General sought rehearing *en banc*, however, not a single judge on the Second Circuit voted for the petition. *Id.* at C2.

REASONS FOR DENYING THE WRIT

The petition fails to satisfy the customary prerequisites for review. Not only does the decision below hew closely to established revenue-rule and RICO decisions, but it also does not conflict with a single decision of any lower court or of this Court. Indeed, to our knowledge, the description of the revenue rule by the Second Circuit—that courts will not enter the "'forbidden waters'" of assessing the validity and applicability of foreign tax laws (Pet App. A8-A9)—does not conflict with a single decision of any court, foreign or domestic, over the last two hundred years. This universality of opinion, including decisions from Canada's own courts, not only confirms the firmly-entrenched nature of the rule, but also illustrates the dramatic impact on foreign policy that a sudden change in this practice could have. On this historical record, the courts below correctly resisted being "drawn into issues and disputes of foreign relations policy" (Pet. App. A18-19) by concluding that Congress, which said nothing about the revenue rule in RICO or its legislative history, did not alter this age-old common-law rule. *See Beck v. Prupis*, 529 U.S. 494, 503 (2000); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992).

Canada's own actions, moreover, disprove the other contention in the petition—that the matter is otherwise

sufficiently pressing to warrant the Court's time. The country has never enacted a treble-damages remedy under its own laws for tax evasion; it has never negotiated a tax treaty with the United States providing for such damages; and it has not even attempted to collect the allegedly lost taxes under its own laws and under existing American-Canadian treaties. Under these circumstances, the Canadian Attorney General cannot credibly claim that this Court (rather than Canadian courts or Canadian law enforcement) should be the first governmental entity to redress these alleged injuries. The writ should be denied.

I. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY OTHER LOWER-COURT DECISIONS.

The first flaw in the petition is that it fails to satisfy the first explanation for granting review. Neither in the court of appeals' decision, in the dissenting opinion, nor in the petition itself does anyone allege that the Second Circuit's decision conflicts with a single lower-court decision from any other federal circuit or state court. Nor could any such claim be made. The Second Circuit's decision simply does not conflict with other lower-court decisions, to say nothing of decisions from foreign courts. The reason is straightforward: Imposing and collecting taxes are quintessentially sovereign acts. As such, the powers do not extend beyond the borders of one country into those of another, and as such no court has ever permitted one sovereign to collect its lost revenues in the courts of another. For this reason alone, the petition should be denied. *Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law. *See* this Court's Rule 10.1.").

II. AS CANADA'S OWN ACTIONS ATTEST, THE QUESTION PRESENTED DOES NOT HAVE THE IMPORTANCE THAT THE ATTORNEY GENERAL ASCRIBES TO IT.

Conspicuously lacking a lower-court conflict, petitioner argues (Pet. 16) that the Court has "repeatedly granted the Writ, even in the absence of a circuit conflict, in cases involving the rights of foreign nations to proceed . . . in the courts of the United States." In making this argument, the Attorney General initially cites (*id.*) a series of Supreme Court cases that purportedly lacked lower-court conflicts and that involved foreign nations or foreign commercial interests. But only one of the cases, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), has any bearing on the Court's certiorari practices over the last 16 years, and it *did* involve a lower-court conflict. *See Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 55-56 (1st Cir. 1999) (citing lower-court split over "challenges to . . . laws targeting specific foreign states" and noting further that "[c]ourts have also split" in interpreting related buy-American statutes). While it is difficult to argue in any setting that prior certiorari decisions recommend review in a later case, that argument is particularly unpersuasive here.

The Attorney General attempts to shore up this contention by suggesting (Pet. 16) that the question is important in view of the relationship between his country and the United States. But it was precisely the nature of the American-Canadian relationship and the risk of cross-border smuggling in the first instance that prompted Canada to enact numerous laws designed to prevent and punish alleged tax avoidance of this sort, then to negotiate an American-Canadian Treaty and Protocol designed specifically to address cross-border tax-collection matters. *See* Appendix A. Through it all, however, Canada never enacted a treble-damages remedy for tax avoidance under its own laws, never negotiated a tax treaty with the United States that would authorize this tax-

collection effort, and has not even attempted to collect the lost taxes under the Canadian laws and American-Canadian treaties that do exist. As Canada's own actions demonstrate, the claim that the Second Circuit's interpretation of RICO's treble-damages provision suddenly demands this Court's review rings hollow.

Also unavailing is the Attorney General's related suggestion (Pet. 16) that this Court should supplement these Canadian remedies with a RICO claim because Canada is a "friendly foreign nation." One of the core functions of the revenue rule is to avoid asking courts—whether the Second Circuit or this Court —to determine which nations are friendly and which are not. Such requests, as the Second Circuit correctly concluded, "are assigned to—and better handled by—the political branches of government." Pet. App. A19. Nothing in RICO itself, moreover, authorizes courts to make special allowances for claims by "friendly" foreign countries or for that matter provides any criteria for ascertaining which countries are sufficiently friendly to warrant a remedy that the political branches of their governments have chosen not to confer by treaty.

Lastly, the availability of remedies under Canadian law and extant American-Canadian treaties shows why the Attorney General cannot credibly claim that the decisions of the lower courts leave Canada without other means to address these issues. Not only may Canada still enforce existing laws in its own courts regarding these claims, but it always retains the option of negotiating a treaty or protocol with the United States that would allow access to American courts to recover its taxes. Though Canada has entered a comprehensive tax treaty with the United States that addresses tax collection assistance (*see* Appendix A), there is no dispute that the Treaty and Protocol do not authorize this claim. As the Second Circuit found, "[b]y permitting such a claim to go forward, we would be ignoring and undermining the treaty negotiation process and the clearly expressed views of the

political branches of the United States." Pet. App. A34. Under these circumstances, the Attorney General's petition for relief is more appropriately addressed to the political branches than to this Court. Perhaps appreciating these factors, one of Canada's provinces did not even seek Supreme Court review in 1979 when the Ninth Circuit rejected its effort to collect lost tax revenues in American courts. *See Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*, 597 F.2d 1161, 1165 (9th Cir. 1979).

III. THE SECOND CIRCUIT'S DECISION IS CORRECT ON THE MERITS.

Unable to establish the customary grounds for seeking review, the Attorney General devotes most of his petition to arguing the merits of the two lower-court decisions against him. But even if this were a traditional basis for seeking certiorari (which it is not), the argument fails on its own terms. The Second Circuit correctly followed this Court's general interpretive canons as well as their specific application to RICO. And because petitioner does not allege, much less show, that the holding below conflicts with a single decision of this Court, this rarely-sufficient ground for granting the writ also comes up short. *See Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

A. In Enacting RICO, Congress Did Not Abrogate The Time-Honored Revenue Rule.

1. The Revenue Rule Was Well Established Long Before Congress Passed RICO.

In 1970, when Congress passed RICO, the revenue rule was as deeply embedded in the common law as it was widespread. Not only had every country to consider the rule

embraced it, including both the United States and Canada, but the rule also formed a pertinent background principle to numerous American tax-collection treaties.

In the United States, it "has long been a general rule that one sovereignty may not maintain an action in the courts of another state for the collection of a tax claim." *United States v. First Nat'l City Bank*, 321 F.2d 14, 23-24 (2d Cir. 1963), *rev'd on other grounds*, 379 U.S. 378 (1965). The revenue rule "has become so well recognized" that when Canada tried to enforce a tax claim in this country in the 1970s, the Ninth Circuit observed (in rejecting the claim) "that this appears to be the first time that a foreign nation has sought to enforce a tax judgment in the courts of the United States." *Gilbertson*, 597 F.2d at 1164 n.7.

This Court, too, has recognized the "principle enunciated in federal and state cases that a court need not give effect to the penal or revenue laws of foreign countries . . . ." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413-14 (1964); *see also Huntington v. Attrill*, 146 U.S. 657, 671 (1892) (federal courts may not entertain "suits . . . for the recovery of pecuniary penalties for any violation of statutes for the protection of [a foreign nation's] revenue"). Other countries, including Canada itself, have embraced this "ancient rule" as well: "[F]oreign states cannot directly or indirectly enforce their tax claims in our courts. . . ." *United States v. Harden*, [1963] S.C.R. 366, 370-71 (Can. 1963). Indeed, the revenue rule "has never been challenged successfully in an international context." Hans W. Baade, *The Operation of Foreign Public Law*, 30 Tex. Int'l L.J. 429, 482 (1995).

In applying the revenue rule, the courts have given it force in at least three settings, among others. It applies when one sovereign attempts to enforce a tax *judgment* in the courts of another. *See Gilbertson*, 597 F.2d at 1163 n.1. It applies when one sovereign attempts to use another country's courts to collect *unadjudicated* tax claims. *See Gov't of India v.*

Taylor, [1955] A.C. 491 (H.L. 1955). And it applies when the action is *indirectly* "a suit brought for the purpose of collecting the debts of a foreign revenue." *See Peter Buchanan Ltd. v. McVey*, [1954] I.R. 89 (Ir. H. Ct. 1950), *aff'd*, [1954] I.R. 89, 115 (Ir. S.Ct. 1951).

In all three settings, the rationale for barring these extra-territorial claims and for steering clear of these "forbidden waters" is the same. Pet. App. B17. Namely, the unilateral enforcement of foreign tax claims, like foreign penal laws, in another nation's courts risks infringing bedrock principles of national sovereignty that are singularly appropriate for political rather than judicial resolution. "[A] claim for taxes is but an extension of the sovereign power which imposed the taxes, and . . . an assertion of sovereign authority by one State within the territory of another . . . is (treaty or convention apart) contrary to all concepts of independent sovereignties." *Gov't of India v. Taylor*, [1955] A.C. at 511. The "presume[d] invalidity" of foreign revenue laws thus stems from "the desire to avoid embarrassing another state by scrutinizing its penal and revenue laws" in the courts of another. *Sabbatino*, 376 U.S. at 437.

Nor, contrary to petitioner's suggestion (Pet. 12-15), has this principle required countries to abandon efforts to stop cross-border tax evasion and smuggling. One nation after another has responded to this limitation on the judicial power in at least two ways. First, they have entered into mutually advantageous executive-branch treaties with other sovereigns to ensure that this kind of tax avoidance does not go unregulated. *See First Nat'l City Bank*, 321 F.2d at 24. Thus, while "the international rule with regard to the non-enforcement of revenue and penal laws is absolute," the "revenue laws may in the future be modified by international convention." *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.*, [1986] A.C. 368, 428 (H.L. 1986). Proving the point, the United States has entered into tax treaties with sixty-one countries, with collection assistance

provisions ranging from the relatively generous assistance given Canada to none at all. *See, e.g.*, U.S.-Canada Income Tax Treaty (1995 Protocol) (permits tax-collection assistance for claims that have been "finally determined" by proceedings in the taxing sovereign's own courts). Second, countries have relied on their own courts to enforce their own civil and criminal laws to collect taxes and prevent smuggling. *See* Canadian Excise Act, R.S.C., 1985, Sec. 240(1). Notably, no claim has been made here that the Canadian Attorney General lacks remedies in Canadian courts against these defendants.

2. RICO Does Not Abrogate This Common-Law Rule.

As the Second Circuit recognized, courts do not lightly impute to Congress a desire to abrogate common-law doctrines. "[W]here a common-law principle is well established," this Court repeatedly has said, "the courts may take it as [a] given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (internal quotation omitted). The Court, moreover, has specifically applied this principle in the context of construing RICO's general terms. *See, e.g., Beck*, 529 U.S. at 504 (construing RICO not to abrogate "well-established common-law civil conspiracy principles"); *Holmes*, 503 U.S. at 267-70 (construing RICO not to abrogate common-law proximate cause requirements).

In the face of these precedents, both lower courts properly recognized that the anti-racketeering provisions of RICO could not be read as a directive to require courts suddenly to entertain tax-evasion claims brought by foreign sovereigns. Indeed, in view of the long-established history of judicial refusal to enforce other countries' tax laws and of executive-branch efforts to negotiate tax-collection treaties, it would have been exceedingly unusual for Congress suddenly

to abrogate the rule when it enacted RICO in 1970. And it would have been doubly so to erect a treble-damages remedy in its stead. Not only would such a law have eliminated more than two centuries of precedent and rendered all but irrelevant countless international tax treaties, but it also invariably would have made American courts the tax-collection capital of the world.

Yet RICO, by its terms, did no such thing. The statute merely authorizes a treble-damages action for injuries to a "person" in "his" or her "business or property" caused by racketeering violations. 18 U.S.C. § 1964(c). It says nothing about authorizing foreign governments to enter this country to collect their lost tax revenues. Nor, throughout the extensive legislative debates over RICO, was a single word mentioned about the revenue rule, to say nothing of abrogating the rule. All told, the court of appeals' analysis of the words, context, history and common-law backdrop of section 1964(c), together with this Court's relevant RICO decisions, reached the only tenable conclusion available. That thoughtful, comprehensive and ultimately correct analysis does not warrant review.

B. The Revenue Rule Applies To Efforts To Use American Fraud Law To Collect Foreign Taxes.

The Attorney General all but ignores this foundational basis for the lower court's decision. He does not deny that federal statutes, and particularly generally-worded statutes, must be read against the common-law tradition in which they were written. And he does not deny that the revenue rule is just such a common-law doctrine. Instead, he attempts (Pet. 9-11) to carve out an exception to the revenue rule—not recognized in 1970 and not recognized at any time since—under which the rule would be inapplicable when the foreign nation purports to rely, in part, on the law of the home state's forum in collecting its taxes.

The argument as an initial matter misapprehends the revenue rule. The rule historically has limited direct *and* indirect attempts to enforce foreign revenue laws—as the following decisions illustrate. In *Banco Do Brasil, S.A. v. A.C. Israel Commodity Co.*, 190 N.E.2d 235 (N.Y. 1963), the New York Court of Appeals found that Brazil could not bring a fraud action governed by New York law against an American coffee importer for a conspiracy to circumvent foreign exchange regulations. The Court found that Brazil was "seeking, by use of an action for conspiracy to defraud, to enforce what is clearly a revenue law." *Id.* at 237. Like Canada, Brazil attempted to use American law and American courts to recover damages stemming from violations of its revenue law, and like the Second Circuit here the court rejected the claim. *Id.*

The same was true in *Moore v. Mitchell*, 30 F.2d 600 (2d Cir. 1929), *aff'd*, 281 U.S. 18 (1930). There, an Indiana official sought to recover back taxes from the executors of an estate in a federal district court located in New York. *Id.* at 603. In doing so, the official brought the claims not under Indiana law, *see id.*, but under "the law of New York." *Id.* As here, the court of appeals rejected this cross-jurisdictional tax collection effort, holding that the Indiana tax collector could not enforce Indiana's tax laws indirectly in New York courts under New York law. *See id.* at 604. *Cf. Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277-80 (1935) (while the Supreme Court later determined that the Full Faith and Credit Clause requires one State to recognize the tax judgment of another State, it observed that the Clause does not apply to foreign countries, which are "free to ignore obligations created under the laws or by the judicial proceedings of the others").

No less significantly, the Attorney General's attempt to restrict the reach of the revenue rule ignores the teachings of his own Supreme Court. In *United States v. Harden*, [1963] S.C.R. at 371, the Canadian Supreme Court foiled an effort by the United States to enforce an American tax-collection

judgment in a Canadian court against a Canadian resident. As in this case, the United States did not try to enforce the foreign tax judgment directly but sought to do so indirectly by purporting to enforce an agreement—the tax settlement—under a breach-of-contract theory. *See id.* (plaintiff's argument was that "the claim asserted was simply for the performance of an agreement, made for good consideration"). The court, however, rejected this end run around the revenue rule, holding—for reasons similar to those offered by the Second Circuit here—that "[w]e are concerned not with form but with substance . . . . The nature of the liability is not altered. It is a liability to pay income tax . . . . [F]oreign States cannot directly or indirectly enforce their tax claims in our courts. . . . " *Id. See also* 1 Dicey & Morris, *The Conflict of Laws* 91 (13th ed. 2000) ("Indirect enforcement occurs where the foreign State (or its nominee) in form seeks a remedy, *not based on the foreign rule in question*, but which in substance is designed to give it extra-territorial effect . . . .") (emphasis added); *QRS 1 APS v. Frandsen*, 3 All E.R. 289 (C.A. 1999), 1999 WL 477337 (Danish companies suing under English negligence theories could not pursue action in English courts as the claims, "in substance, . . . involve[d] the indirect enforcement of Denmark's revenue law"); *Peter Buchanan Ltd. v. McVey,* [1954] I.R. 89 (Ir. H. Ct. 1950) (barring a party in Irish court who was asserting an Irish fraud theory from relying indirectly on Scottish revenue laws to obtain relief).

Not just precedent, but common sense as well, defeats the Attorney General's novel theory. As these courts appreciated and as the Second Circuit recognized, petitioner's innovation has no cognizable limit. For it invariably will be the case that an effort to recover lost taxes may be converted into a claim for breach of contract, tort, fraud, or some other tax-recovery theory masquerading as a domestic law of the home forum. So long as the measure of damages is lost revenues or law-enforcement costs related to them, the revenue rule applies. In the end, Canada's own Supreme

Court put it best: The rule bars one country from "directly or indirectly" enforcing the tax claims of another country. *Harden*, *supra*, at 371. That was true in *Harden*; it is true here.

C. The Attorney General Errs In Claiming That The Second Circuit's Decision Will Interfere With Traditional Tax-Collection Efforts.

Petitioner also claims (Pet. 12-15) that the Second Circuit's decision will undermine international tax-collection efforts. In truth, however, the Attorney General has it exactly backwards. The sudden repeal of the revenue rule not only would open American courts to an onslaught of foreign tax claims but also would undermine the executive branch's ability to negotiate tax treaties with other nations.

The American courts' acceptance of the revenue rule stems from core separation-of-power requirements, which allow the political branches to determine whether, when and how U.S. government instrumentalities may be used to assist foreign governments in the collection of their taxes. Permitting claims like this would interfere with the authority of the political branches of government to address the enforcement of foreign revenue laws through international treaties.

In the case of Canada, moreover, the United States has specifically addressed mutual assistance in collecting revenue claims in recent amendments to the U.S.-Canada Convention With Respect to Taxes on Income and Capital. *See* Income Tax Treaty (1995 Protocol); *see also* Appendix A. This assistance is limited in a number of ways, however, reflecting the considered policy judgment of the political branches of each government. *See* Pet. App. A28-34. Canada is one of only five countries (including France, Netherlands, Denmark, and Sweden) with whom the United States has agreed to provide general assistance in collecting tax judgments. And

all of these treaties (1) require final determinations of liability in the requesting country, and (2) expressly exclude U.S. assistance in the collection of foreign taxes from U.S. citizens or corporations. *See* Pet. App. A21-28.

In bringing this lawsuit, the Attorney General chose to ignore the 1995 Protocol. Had the lower courts permitted a RICO treble-damages remedy here, they would have given Canada—and every other foreign sovereign (friendly or not) —a powerful incentive to pursue an American litigation remedy to their tax disputes rather than take the steps necessary either to make use of the collection processes established by treaty or to re-negotiate the applicable treaty. Canada and other foreign nations in short would have no tenable reason to negotiate reciprocal tax collection assistance rights with the United States if our courts and our legal theories were already available to collect their taxes. In the final analysis, petitioner could not be more mistaken in arguing (Pet. 9) that "[t]here is no foreign policy reason" to prevent its claims.

IV. THIS CASE PRESENTS A POOR VEHICLE FOR REVIEWING THESE ISSUES.

Petitioner, lastly, errs in claiming (Pet. 17) that this case presents "an excellent vehicle" for review. For one, a case rarely presents a good vehicle for review in the absence of a split in lower-court decisions. The percolation process by itself illustrates which cases are good vehicles and which are not, allows other lower courts to weigh in on the issue, and ultimately ensures (to quote petitioner (Pet. 17)) that the "genie" is not let out of the bottle prematurely.

For another, respondents have raised a host of additional grounds for dismissing the Attorney General's claims as a matter of law, not one of which the Second Circuit needed to reach in light of its conclusion that RICO did not abrogate the revenue rule. In the lower courts, respondents argued that the extension of RICO to foreign tax-collection claims would

violate the Constitution's separation-of-power requirements, would (at a minimum) trigger constitutional-avoidance considerations, would raise an impermissible political question, and would implicate this Court's sovereign-immunity decisions since petitioner's theory of relief necessarily would permit money-damages claims by *and against* foreign sovereigns. The Second Circuit, however, did not address any of these alternative grounds for relief. Under these circumstances, not only would denying the petition allow the issue that *was* addressed to percolate in the lower courts, but it also would give lower courts an opportunity to reach these additional defenses. While respondents may of course raise these defenses in this Court as alternative grounds for affirming the judgment, *see Bennett v. Spear*, 520 U.S. 154, 166 (1997), the Court has long expressed a preference for reviewing decisions that *have* considered the federal questions presented, *see Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999). Review of the issue thus is not only premature but is not well presented either.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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APPENDIX

Appendix A

Current International, Bilateral and Domestic Mechanisms Available to Combat US-Canadian Cross-border Smuggling and Money Laundering

TREATIES ADDRESSING SMUGGLING AND OTHER CROSS-BORDER CRIMINAL CONDUCT

- **Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital**, Sept. 26, 1980, T.I.A.S. No. 11087; Protocol Amending Tax Convention with Canada, Nov. 9, 1995, U.S.-Can., 1 Tax Treaties (CCH) ¶ 1901. 261, at 21,005-26. The Treaty specifically addresses tax collection assistance and provides that the parties to the treaty will assist each other in collecting certain revenue claims that have been "finally determined" by proceedings in the taxing sovereign's own courts. Art. XXVI A(2). Unlike the other provisions of the treaty, this provision applies to all types of taxes collected by each party. The assistance is limited in several ways. Among other things, the Treaty (1) applies only to claims against the requesting country's citizens; (2) is limited to revenue claims that have been "finally determined" after exhaustion of all administrative and judicial rights; and (3) is limited to claims that are "accepted for collection" by the Secretary of the Treasury, who is empowered to reject claims for any reason.

- **The United Nations Convention Against Transnational Organized Crime** (2000) (the "Palermo Treaty"). The United States and Canada have both signed the Palermo treaty but neither has yet ratified it. The multilateral treaty is intended to combat transnational money laundering and organized crime. It requires each signatory to criminalize participation in transnational organized crime and money laundering and to establish criminal and/or civil remedies. A "serious crime," which is the predicate offense for organized crime, includes any offense punishable by a

maximum deprivation of liberty of at least four years or more. This encompasses a number of crimes, including mail fraud and wire fraud. Finally, the Treaty provides for extradition where appropriate under the signatory country's laws.

CANADIAN LAWS AND INITIATIVES ADDRESSING SMUGGLING AND OTHER CROSS-BORDER CRIMINAL CONDUCT

- **The Canadian Excise Act** makes it a crime to sell or offer for sale tobacco products on which excise taxes have not been paid. The statute provides for remedies including fines and jail time. *See* Excise Act, R.S.C., 1985, sec. 240(1). The criminal conspiracy statute creates equivalent penalties for conspiring to sell or offer to sell such tobacco products, including by smuggling them. *See* Criminal Code, Sec. 465(1)(c).

- **The Anti-Smuggling Initiative**, introduced in 1994, provides resources for the Canadian police and the Ministries of Justice and Revenue to target smuggling and distribution networks at the border, in ports, and across the country. In June of 1999, the Government of Canada injected another $78 million over the next four years to combat smuggling. This initiative has led to 17,000 smuggling-related charges resulting in fines in excess of $113 million, and $118 million in evaded taxes and duties have been identified.

UNITED STATES LAWS ADDRESSING SMUGGLING AND OTHER CROSS-BORDER CRIMINAL CONDUCT

- **Smuggling**: Using a vessel to smuggle goods into a foreign country in violation of that country's laws is criminalized by 18 U.S.C. § 546; 19 U.S.C. § 1701 authorizes the boarding of vessels to investigate smuggling. Depositing goods in a building on the boundary between the U.S. and another country or

transporting goods across such a boundary in violation of law is criminalized by 18 U.S.C. § 547.

- **Other U.S. Criminal Laws Used to Fight Smuggling**: Prosecutors have successfully targeted smuggling schemes by using mail fraud, wire fraud and money laundering laws. Laundering money in furtherance of a criminal scheme is prohibited by 18 U.S.C. § 1956. Committing any scheme to defraud using the United States mail is criminalized by 8 U.S.C. § 1341. Committing any scheme to defraud using the interstate wires, including the telephone, is criminalized by 18 U.S.C. § 1343.

BILATERAL INITIATIVES COMBATING SMUGGLING AND OTHER CROSS-BORDER CRIMINAL ISSUES

- **The Canada-U.S. Cross-Border Crime Forum** is a bilateral consultative mechanism to address cross-border crime issues, particularly smuggling. Established in April, 1997 by the President of the United States and the Prime Minister of Canada, the Forum brings together over 100 senior law enforcement and justice officials from Canada and the U.S. on transnational crime problems such as smuggling, organized crime, telemarketing fraud, money laundering, missing and abducted children, crime using computers and other emerging cross-border issues. Resulting agreements between Canadian and U.S. law enforcement agencies provide reciprocal direct access to each other's criminal databases. *See* Office of the Solicitor General of Canada, The Canada-U.S. Cross-Border Crime Forum(Sept.2001) *at* http://www.sgc.ca/WhoWeAre/Policing/CrossBorder/ecrossborder/ecrsbrdr_bkgrd200109.htm.

- **Integrated Border Enforcement Teams** ("IBET") are multi-agency law enforcement teams of United States and Canadian police, immigration and customs officials working together with local, state and provincial

enforcement agencies. The West Coast IBET, established in 1997, averages seizures of about $1 million a month. These seizures include illicit drugs, weapons, tobacco and alcohol, and vehicles. An East Coast IBET was created in June 2000. *See* Press Release, Office of the Solicitor General of Canada, U.S. Attorney General and Solicitor General of Canada Announce New Measures to Tighten Border Security (June 9, 2000) *at* http://www.sgc.gc.ca/Releases/Backgrounders/e20020228.PDF

- The Government of Canada and the Mohawk Council of Akwesasne have instituted new measures to fight cross-border crime, including the investment of an additional $4.6 million to enhance the capacity of the Akwesasne Mohawk Police (AMP) to combat criminal activities in and around the region, which straddles the U.S-Canadian border. The funding will mean more AMP officers for the Mohawk Territory of Akwesasne, which allows for increased participation by the AMP in joint-force border operations. *See* Press Release, Office of the Solicitor General of Canada, Canada-Akwesasne Get Tough on Cross-Border Crime (Feb. 28, 2002) *at* http://www.sgc.gc.ca/Releases/e20020228.htm.